No. 9277

United States
Circuit Court of Appeals
For the Ninth Circuit

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

vs.

JAMES RALPH HUNT, *Appellee.*

Appellant's Reply Brief

Appeal from the District Court of the United States for the District of Oregon.

JAMES ARTHUR POWERS,
Attorney for Appellant.

GEO. L. RAUCH,
Attorney for Appellee.

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APPELLANT'S REPLY BRIEF

A reply brief seems necessary because appellee has raised a new question in his brief, which is outside the points designated on appeal. Also the reply brief will attempt to sift out and classify appellee's contentions which appear at random in his brief. Appellee's contentions seem to be these:

(a) (New Point) That the appellant is deprived of its common law defenses because of the Oregon Workmen's Compensation Act;

(b) That the appellee, in receiving the various compensation checks and having his medical expense paid, cannot be said to have settled his claim because all drafts, except one, refer to the date of accident as June 11, 1934, instead of November 5, 1934; (b1) That all appellee intended to settle was his loss of wages while reserving his right to file an action for pain and suffering; (b2) That he only received $33.00 for his accident of November 5, which would not be enough to compensate him for his injuries;

(c) That the appellee was not aware of any danger in using the jack; (c1) That the Ford jack was a complicated and dangerous piece of equipment.

REPLY TO POINT (a)

This new point raised by appellee seems futile BECAUSE the law does not allow an appellee to raise a new point on appeal in the absence of taking a cross-appeal; (*Hyland vs. Millers Nat. Ins. Co.* (C.C.A. 9th 1937) 92 F. (2d) 462; *Blackhurst vs. Johnson* (C.C.A. 8th 1934) 72 F. (2d) 644; *Merchants' & Manufacturers' Securities Co. vs. Johnson* (C.C.A. 8th 1934) 69 F. (2d) 940; *Morrison vs. Burnette* (C.C.A. 8th 1907) 154

Fed. 617;) BECAUSE the new point is contrary to the theory upon which the case was tried; (R. 168 "The Court * * * So the matter will proceed as a common law action from here on * * *") BECAUSE it presents a new theory not raised by the pleadings or formulation of issues and concerning which appellant had no opportunity to introduce evidence (R. 168). MOREOVER the contention is specious since the Court below ruled as a matter of law that the work plaintiff was doing did not involve a risk and danger. Risk and danger being synonymous with hazardous work (R. 168). And finally, it has been held that even under the Workmen's Compensation Act, the simple tool doctrine is still applicable as a defense by the employer.

ARGUMENT

Appellee does not controvert appellant's statement of the case but makes an additional statement in which is included testimony of a witness (Ernest H. Coats) which was not in the record at the time appellant's brief was filed and which testimony by supplemental record was filed after appellant's brief had been filed herein, under an order of the District Court without notice to appellant. (See affidavit attached to appellant's Motion to Strike filed in this Court November 13, 1939.) This new matter has to do with testimony concerning the use

of compressed air which is pumped up with an electric motor at the filling station, and, in appellant's view, has no proper place under the points designated on appeal. It does, however, add confusion. As is seen from appellee's brief, the purpose of this additional testimony is to furnish factual material for the argument that appellant under the Workmen's Compensation Act of Oregon is deprived of its common law defenses. This new question cannot be raised in absence of cross-appeal.

Morrison vs. Burnette, 154 Fed. 617, 620:

> "The appellees have taken no appeal and they cannot invoke the jurisdiction of a federal appellate court to consider or decide questions of this nature by an assignment or by an argument of cross-errors."

Merchants' & Manufacturers' Securities Co. vs. Johnson, 69 F (2d) 940, 944:

> "* * in the absence of a cross-appeal, questions decidedly adverse to appellee will not be considered on appeal."

Blackhurst vs. Johnson, 72 F. (2d) 644, 649:

> "She (appellee) has, however, not appealed, and questions decided adversely to a party who has not appealed will not be considered on appeal. Appellees can be heard only in support of the decree which was rendered."

See also: *Hyland vs. Millers Nat. Ins. Co.,* 9th C.C.A., 92 F. (2d), 462, 464, which supports the rules announced in the cases above.

Outside of the fact that this new matter is contrary to the stipulation of counsel (R. 182) and Points Designated on Appeal (R. 185), the question of whether appellant was deprived of its common law defenses was decided by the District Court contrary to appellee's new contention. (R. 168.) Appellee in his complaint alleged the work he was doing involved a risk and danger and charged appellant with violation of the Oregon Employer's Liability Act. Sec. 49-1701-1706, Oregon Code 1930, R. 17). The District Court on motion of appellant at the conclusion of plaintiff's case held that work plaintiff was doing did not involve a risk and danger and that the Employer's Liability Act was not applicable (R. 168).

As will be seen from the record here, the within case, after the ruling of the Court during trial, was tried solely on the theory that it was governed by the rules of common law and that no statutory law such as the Workmen's Compensation Act was involved. The Court having ruled as a matter of law that the work plaintiff was doing did not involve a risk and danger within the Employer's Liability Act and as will be seen the District Court instructed the Jury under the law of the case that the defense of assumption of risk was available to the defendant. (R. 171).

> "* * * The defendant has pleaded another defense as it is allowed to by law in cases of this kind called assumption of risk."

And submitted the matter to the Jury as to whether there was danger in using the jack and instructed the Jury upon it as follows:

> "in changing the tire in this particular way was a danger or risk of the kind that the plaintiff knew and that he appreciated and understood (and if so) he would not be entitled to recover."

Counsel for appellee took no exception to this theory of the law as given in the Court's instructions. (R. 175):

"MR. RAUCH: We have no objection."

It was never before contended on such theory that appellant would not be entitled to its common law defenses nor that the assumption of risk doctrine was inapplicable.

The contention at this late date that work appellee was doing was a hazardous work under the Workmen's Compensation Act, is without merit.

The Employer's Liability Act has always been considered to be more comprehensive than the Workmen's Compensation Act. Attorneys in filing master and servant cases under the Oregon law follow the practice as was done in this case of charging a violation of the Employer's Liability Act rather than a violation of the Work-

men's Compensation Act and although the meaning of both acts as to the type of work which would deprive a master of his common law defenses, is the same as far as this case is concerned, yet the Employer's Liability Act has been considered to be and is more extensive. An illustration of this proposition, namely, that if the Employer's Liability Act does not apply that an employer's common law defenses are available to him, may be found in the cases of

Freeman vs. Wentworth & Irwin, Inc., 139 Or. 1; 7 P. (2d) 796;

Hoffman vs. Broadway Hazelwood, 139 Or. 519; 10 P. (2d) 349;

The Employer's Liability Act refers to the type of work involving risk and danger, whereas, the Workmen's Compensation Act refers to hazardous work. These words are synonymous. Hazardous has the same meaning as risk and danger. Webster's International Dictionary defines "hazardous" as "exposed to hazard; dangerous; risky;" and gives the synonyms of "perilous; dangerous." Corpus Juris gives the definition as follows: (29 C. J.236)

"HAZARDOUS. Exposed to or involving danger; perilous; risky." (citing numerous cases)

Bouvier's Law Dictionary, Students Edition, 1928, defines hazardous as "risky; perilous; involving hazard

or special danger." Such latter definition seems to suggest that hazardous implies more than ordinary danger and uses the words "special danger". In other words, a work that involved a risk and danger would be bound to be hazardous and in this respect the only difference between the two acts is that the Workmen's Compensation Act limits the hazardous work to particular classifications whereas the Employer's Liability Act has no such limitation and hence is more extensive. The mere fact that an employer rejects the compensation act is no evidence that the act is applicable to the particular work being carried on by the employer. See *Hoffman vs. Broadway Hazelwood,* in which case it was held that the Employer's Liability Act did not apply as a matter of law and headnote 6 states:

> "That employer rejects Compensation Act does not affect its applicability, and evidence of its rejection is immaterial upon that question."

It must be obvious and the Act itself recognizes that an employer may be carrying on certain work that would fall within the act and other work that would not fall within the act. This is particularly true of a concern such as the appellant Union Oil Company.

Heretofore appellee made no contention in his complaint, nor during the trial, nor in argument of the law on motions after trial that his work was hazardous within the meaning of the Workmen's Compensation Act, nor

that said act deprived appellant of its common law defenses, and in view of the fact that everything done and ruled on in the Lower Court is contrary to this new point it seems specious to try to raise it at this time on appeal.

Moreover the 1935 amended Workmen's Compensation Act cited and relied on by appellee in his brief was not the law in effect the time this accident occurred. If the Workmen's Compensation Act was applicable at all, which we submit it is not, it would be the earlier Workmen's Compensation Act and which was in effect during 1934 as it appears in Oregon Code of Laws, 1930, Section 49-1815.

REPLY TO POINT (b), (b1) and (b2)

Factual argument by appellee not supported by record.

AUTHORITIES

Record on appeal:

Anderson vs. Hartford Accident & Indemnity Co., 152 Or. 505; 53 Pac. (2d) 710;

McDonough vs. National Hospital Association, 134 Or. 451; 294 Pac. 351;

Appellee argues that the policy under which the major portion of the money was paid, expired on July 1,

1934, and therefore the company would have no liability under it for any accident that occurred on November 5, 1934. However, the fact is as is conceded by appellee's brief that appellants insurance carrier was advised by Dr. Dillehunt, who performed the fusion operation that the plaintiff's condition related back to his accident in June, 1934, and at a time that the policy referred to was in effect. The mere fact that it expired on July 1, 1934, would not relieve the company from liability for an accident that had occurred while the policy was in effect. A policy of insurance may expire but its expiration cannot relieve it from liability that occurred or accrued while the policy was in force.

Appellees back bothered him right along from the time of the June accident. He testified that after the June accident, his back continued to bother him. (R. 40):

> "Well, it was a constant pain there. If I would strain myself the pain would go up from my back and it would ache, I would have to sit down and rest, and it made me irritable, and there was always a dull ache right between my hips."

The appellee's testimony fits in with what he told the insurance adjuster, who testified (R. 132):

> "Q. And did Mr.—what did Mr. Hunt tell you, if anything, about the occurrence there on November 5th, 1934?

"A. Mr. Hunt explained that he had had a recurrence of an injury that he had had in June, I think it was June the 11th, 1934.

"Q. What, if anything was said about an operation?

"A. He said they had talked to Dr. Dillehunt and he had recommended a fusion operation."

The record shows that after the insurance company undertook to pay the appellee the benefits of the compensation act that they indicated on the first two drafts that the injury resulted from an accident on November 5, 1934. A notation on one of the drafts was then changed to show that the injury resulted from the accident of June, 1934, and all subsequent drafts referred to the accident as of June, 1934, the record shows the reason for the change was that the doctor who performed the operation advised the insurance company that it was necessitated by the June accident (R. 142). That appellee had a chronic weak back is shown by his own testimony. He had to wear a brace after the June accident until after the operation was performed and his back was made strong enough to enable him to discard the brace entirely. There were no compensation payments made to the appellee himself until after he entered the hospital in the early part of 1935. There was a bill for medical services

paid to a Dr. Simmons but no bill up to that time was paid to Dr. Dillehunt, the surgeon who performed the operation, and the surgeon under whose care appellee was after the June accident. When Dr. Dillehunt's bill was paid, it was paid in one lump sum of $414.50. This included all the services which he had performed for appellee which began in June, 1934, including the special steel brace which Dr. Dillehunt had made for the appellee (R. 161, ex. 33). It was this doctor's opinion that the appellee's trouble originated in June, 1934, (R. 160 ex 33) that he was going to have this constant trouble with his back unless he had an operation. That is the reason that the charges here were made against the insurance policy which was in effect in June, 1934. The record shows it did not make any particular difference to the insurance company as to which policy it would charge these payments. The insurance company had identical coverage for both periods involved. One policy simply went into effect upon the expiration date of the other. They were identical in terms and conditions except that one policy (ex. 26) covered the Union Service Stations, Inc., a subsidiary of the Union Oil Company, which ceased to do business July 1, 1934, when the Union Oil Company took over all its assets and liabilities. The other policy (ex. 27) was in favor of the Union Oil Company. Both policies covered the identical operations and the

identical employees at the station where appellee was working. Appellee had been employed by the Union Service Stations, Inc., until July 1, 1934, when the assets were taken over by the Union Oil Company. He continued working at the same service station for the Union Oil Company. Appellee disregards the fact that the record shows that after appellee's operation to strengthen his back, he was able to discard the back brace and go back to work, reporting to the operating surgeon that he was free from pain (R. 161 ex 33) and that appellee, two years after the June, 1934, accident made a written application for insurance representing that he was fully recovered and related his prior trouble to June, 1934 accident. (R. 148, ex. 1) and yet argues in the brief that he is entitled to some compensation for a permanent disability.

Outside of the fact that such contention runs squarely against the doctrine that a person cannot split his demand or cause of action, he is faced with the provision for medical arbitration contained in the policy. Compliance with this provision was held by the Supreme Court of Oregon to be a condition precedent to any action. *Anderson vs. Hartford Accident & Indemnity Company,* 152 Or. 505; 53 Pac. (2d) 710.

If Appellee here has any permanent disability he has the right under the terms of this policy, admittedly the policy under which the insurance company made payment

and which appellee accepted payment, to demand a medical arbitration and have determined the question of whether he has any permanent disability. The policy gives the appellee a direct right of action against the insurance company. This policy is made for his special benefit as an employee of appellant; he has accepted very substantial benefits amounting to $820.65 (R. 153) and if the appellee is entitled to any further benefits as measured by the State Workmen's Compensation Act, he has the right under his agreement with the insurance company to demand these directly under this policy from it; and if in fact there were any such permanent disability, it could be determined by the medical arbitrators provided for. Such medical arbitration would be a condition precedent to any action against the insurance company. This as a reasonable provision and tends to take the element of chance out of cases of this kind. It is of definite benefit to an injured workmen. It provides a fair and speedy remedy as to the extent of injuries or the permanency of injuries through medical arbitration in the event of a dispute between the parties. Appellee in his brief, continues to speak of "loss of time"; that he thought he was getting paid for loss of time. This contention is also at variance with the record because the appellee stated, himself, on the witness stand that he went to the insurance company to see what they would do about his condition and that he

understood that he was to get his medical and hospital bills paid and to receive compensation—certainly this was something more than loss of time where his medical expenses were paid for him in the sum of $585.35. Moreover it doesn't matter whether this money was paid under one policy or the other. Or for that matter, it wouldn't alter the situation if the money was paid even by some third party. Oregon Supreme Court has held this in the case of

McDonough vs. National Hosp. Ass'n., in which case the Court states: (P. 455)

> "The general rule is that when a plaintiff has accepted satisfaction in full for an injury done him, *from whatever source it may come,* he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages;"

REPLY TO POINT (c) and (c1)

AUTHORITIES

Ridley vs. Portland Taxicab Co., 90 Or. 529; 177 Pac. 429;

White vs. Consolidated Freight Lines, 73 P. (2d) 358; 192 Wash. 146;

Ocean Accident & Guaranty Corp. vs. Rubin 73 F (2d) 159;

ARGUMENT

Appellee injects a good bit of factual argument in his brief which is not supported by the record. He argues that because of the sales pressure put on the appellee that appellee had to change this tire. The record shows (R. 50) that appellee could have had another station take care of the work and that he didn't do this because he said he wanted the business himself under a quota system. There is no basis in the record for the contention that he was forced or driven to do this work. It was optional with the appellee whether he would do it or not. He merely had to step to a telephone if he didn't want to do it and have it done by a closer station. It is also to be noted from the record (contrary to his now claimed pressure) that he was instructed not to do any heavy work (R. 39) appellee stated after his June accident that he returned to work "with instructions that I was to do light, easy work." (R. 39) There is not a word in the record that anyone ever asked him to do any heavy work. He did only what he himself undertook to do and doing the particular work at the time of the accident if it could be considered heavy work, was directly against the instructions given to him by the doctor. The record, instead of showing any pressure brought on the appellee to do heavy work, shows that he was favored.

Counsel, in trying to overcome the rule that an em-

ployee assume the ordinary risk, finally takes the position that using the Ford jack involved an extraordinary risk and danger, he claims in his brief (p. 72) that this jack was "most highly and dangerously complicated". Presumably he wants this Court to infer therefrom that the appellant, his employer, had some secret knowledge about appellee's jack which he, himself, did not have. Appellee's argument continues along the line that the appellee himself did not know that the jack was dangerous to use, that he thought it was safe to use. It is difficult to conceive of a tool that has been in more common use during the past several decades than an ordinary lever type Ford jack. It is common knowledge that when an automobile is sold, part of the standard equipment that goes with the car is a jack to be used in raising the car in changing tires. In days not long past, anyone driving a car any distance at all might expect to change one or a good many tires. No special instructions came as to the use of a jack. The type involved here worked on the simple leverage principle. Moreover it appears from the record that nothing was defective about the jack itself. As pointed out in the original brief herein the manner in which this accident occurred is left entirely to speculation and conjecture. For that reason alone there was no evidence to support a verdict herein for the appellee. Appellee testified that the car simply slipped off the

jack and later when the other filling station attendant came from the other station, it was his testimony that he found the jack underneath the car and that he went ahead and used it for the same purpose that appellee was using it and this was done without any difficulty or trouble. (R. 91) In the case of *Ridley vs. Portland Taxicab Co.,* 90 Or. 529; 177 Pac. 429; an employee operating a taxicab at night when it was dark found it necessary to change a tire. He was unfamiliar with the tools and was working in the dark and he sustained an injury. The Supreme Court held that he was not within the Employer's Liability Act and in doing so necessarily recognized the fact that there is nothing hazardous or dangerous about using tools in changing a tire on a car. In the instant case it seems clear that such doctrine is all the more applicable as the tire was being changed by a man who had been doing this type of work for at least a year. The work was done in the daytime; it was daylight; he was not working in the dark and with strange tools as was the situation in the Ridley case. Appellee had a choice of what tools he was going to use and he used his own tool. The Supreme Court of Washington followed the Ridley case in *White vs. Consolidated Freight Lines,* 73 P. (2d) 358, holding that the Oregon Employer's Liability Act did not apply to an injury to the driver of a large truck and trailer through an accident caused by defective light-

ing equipment thereon which failed. This Court in the case of *Ocean Accident & Guaranty Corp vs. Rubin,* 73 F. (2d) 159, took judicial notice that changing automobile tires might be incidental to any kind of work and seems to recognize the proposition that there is nothing particularly dangerous in changing an automobile tire on a highway. In any event as pointed out in appellant's original brief the Court, in instructing the Jury, erroneously stated the law respecting the assumption of risk doctrine.

Respectfully submitted,

JAMES ARTHUR POWERS

Attorney for Appellant.